

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO: 5:10-CR-00351-BR

UNITED STATES OF AMERICA

v.

WALTER KEVIN BAILEY

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ORDER

This matter is before the court on review of the docket in this case.

In 2011, defendant was convicted of several counts, including being a felon in possession of firearms. The court sentenced him to 120 months imprisonment, the statutory maximum, on each count, to run concurrently. In 2012, defendant filed *pro se* a motion for appointment of counsel to assist him with obtaining relief in light of United States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc). (DE # 103.) Counsel, who had been appointed to represent defendant pursuant to standing order No. 11-SO-3, filed a response to the motion. (DE # 104.) According to counsel, defendant does not qualify for relief under Simmons because defendant's term of imprisonment would remain the same even if his conviction for being a felon in possession of firearms was vacated. (Id.) Upon counsel's response, the court denied as moot defendant's motion to appoint counsel and directed the government to file a response to counsel's filing. (DE # 105.) The government did so.¹ (DE # 107.) It agrees that vacating defendant's conviction for being a felon in possession of firearms would have no effect on his total term of imprisonment. (Id.) In any event, the government argues, petitioner would not be entitled to pursue such a claim for relief under 28 U.S.C. § 2255. (Id.)

¹Its motion for an extension of time to file the response is ALLOWED.

The decision whether to pursue relief under § 2255 rests entirely with defendant. At this point, defendant has not filed a § 2255 motion. Therefore, the court will not disturb defendant's judgment of conviction and expresses no opinion on the merits of any claim defendant might have based on Simmons.

This 11 February 2013.

A handwritten signature in green ink, appearing to read "W. Earl Britt", is positioned above a horizontal line.

W. Earl Britt
Senior U.S. District Judge